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11
12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**
14

15	FRANK COHN, Individually and on)	Case No.: 2:11-CV-1832-JCM-RJJ
	behalf of a class of all)	
16	similarly situated persons,)	PLAINTIFF'S MOTION TO DISMISS
)	DEFENDANTS' COUNTERCLAIM
17	Plaintiff,)	
)	
18	v.)	
)	
19	RITZ TRANSPORTATION, INC., AWG)	
	AMBASSADOR, LLC, ALAN WAXLER,)	
20	and RAYMOND CHENOWETH,)	
)	
21)	
	Defendants.)	

22
23
24 Plaintiff, through his attorneys, Leon Greenberg
25 Professional Corporation and Gabroy Law Offices, hereby submits
26 this Motion to Dismiss Defendants' Counterclaims.

27 Plaintiff's motion is made and based upon the memorandum of
28 points and authorities submitted with this motion and the other

1 papers and pleadings in this action.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **Summary of Argument**

4 The counterclaim filed by defendants is wholly improper and
5 must be dismissed. Defendants' proposed counterclaim is not, as
6 the defendants may assert, a compulsory counterclaim. Rather,
7 defendants are attempting to have the Court exercise jurisdiction
8 over a claim separate and apart, and completely unrelated, to the
9 claims asserted in this case. Such claim only constitutes a
10 permissive counterclaim, arising from events other than those
11 that led to the plaintiff's claims in this case.

12 More importantly, the proposed counterclaim lacks its own
13 independent basis for federal subject matter jurisdiction.
14 Because the defendants are asserting a state law counterclaim
15 wholly unrelated to the original claims in this case, the Court
16 is without any power to assert supplemental jurisdiction and rule
17 on such counterclaim.

18 **ARGUMENT**

19 **I. DEFENDANTS' PROPOSED COUNTERCLAIMS ARE PERMISSIVE**
20 **AND CANNOT BE PROPERLY ASSERTED IN THIS CASE**

21 The Ninth Circuit utilizes the "logical relationship" test
22 when determining whether a counterclaim is compulsory. The test
23 states that "a logical relationship exists when the counterclaim
24 arises from the same aggregate set of operative facts as the
25 initial claim, in that the same operative facts serve as the
26 basis of both claims or the aggregate core of facts upon which
27 the claim rests activates additional legal rights otherwise
28 dormant in the defendant." *Montana v. Goldin*, 394 F.3d 1189,

1 1196 (9th Cir. 2005). "This approach looks to 'whether the issues
2 of law and fact raised by the claims are largely the same and
3 whether substantially the same evidence would support or refute
4 both claims.'" *Destiny Tool v. SGS Tools Co.*, 344 Fed. Appx. 320,
5 323 (9th Cir. 2009), quoting, *Sanders v. First Nat'l Bank & Trust*
6 *Co. in Great Bend*, 936 F.2d 273, 277 (6th Cir. 1991).

7 Defendants are attempting to assert in this action a
8 counterclaim that is wholly unrelated and factually dissimilar to
9 the original claims brought by the plaintiff, such original
10 claims being the basis for this Court's jurisdiction. The
11 counterclaim asserted by defendants seeks a judgment to recover
12 for the alleged negligence of the plaintiff resulting in property
13 damage to the defendants.¹

14 Defendants have not been able to draw a "logical
15 relationship" showing that their counterclaim for property damage
16 arises from the same set of operative facts as the initial claim
17 (failure of defendants to pay overtime to shuttle bus drivers
18 under the Fair Labor Standards Act ("FLSA")).

19 The basis of the counterclaims asserted by defendants is
20 that the plaintiff breached his "Duty of Loyalty" by engaging in
21 gross negligence causing several collisions resulting in damages
22 to the defendants in the amount of \$10,000.00. Defendants
23 further allege that the plaintiff caused such collisions with
24 malice in order to induce the defendants to discharge him, and
25 create violations of Nevada laws by the defendants. See, Doc.
26 No. 4 at p. 3.

27
28 ¹ See, Defendants' Answer (Doc. No. 4).

1 The above allegations concern matters wholly outside the
2 scope of this litigation. This litigation concerns defendants'
3 failure to pay the plaintiff and persons similarly situated to
4 the plaintiff overtime or other wages under the FLSA and Nevada
5 law. Defendants' counterclaim involves a tort that bears no
6 relationship to the wage payment practices of the defendants.

7 Moreover, under *Destiny Tool*, above, the Court must look at
8 "whether substantially the same evidence would support or refute
9 both claims." *Id.* The evidence and discovery at issue in this
10 case, which will include paystubs and time records, are void of
11 any information relating to the alleged collisions or property
12 damage suffered by the defendants. Such evidence, therefore, can
13 clearly not be used to support or refute both claims. As a
14 result, additional, entirely separate, and presumably voluminous
15 and lengthy discovery would need to be exchanged and analyzed in
16 order to evaluate the counterclaim being interposed.

17 The FLSA claim, which creates original jurisdiction in this
18 Court, seeks to vindicate the plaintiff's federally secured
19 rights to be paid a proper wage under federal law. The
20 counterclaim, on the other hand, encompasses an evaluation of
21 tort law, involving an alleged negligent act resulting in
22 property damage having no relationship to the wage payment
23 practices of the defendants. *See, Taylor v. Bryant, Inc.*, 275 F.
24 Supp. 2d 1305, 1307 (Dist. Nev. 2003) (Dismissing permissive
25 counterclaims for lack of jurisdiction). Such differences
26 clearly makes this counterclaim permissive in nature.

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1 **II. THE COURT IS WITHOUT JURISDICTION TO HEAR**
2 **THE COUNTERCLAIM ASSERTED BY THE DEFENDANTS**

3 Where the Court's jurisdiction is based on federal question
4 jurisdiction, as it is in this case, "the district courts shall
5 have supplemental jurisdiction over all other claims that are so
6 related to claims in the action within such original jurisdiction
7 that they form part of the same case or controversy under Article
8 III of the United States Constitution..." 28 U.S.C. § 1367(a).
9 The "original jurisdiction" action in this case is based on the
10 plaintiff's FLSA claim.

11 This Court has stated, "federal courts have supplemental
12 jurisdiction over compulsory counterclaims, but permissive
13 counterclaims require their own jurisdictional basis." *Taylor v.*
14 *Bryant, Inc., supra*, at p. 1307. Another District Court, in a
15 case involving an employer's violation of the Consolidated
16 Omnibus Budget Reconciliation Act ("COBRA") in connection with an
17 employee's health insurance benefits, remarked, "[t]he factual
18 basis underlying Bloomingdale's counterclaim is that Keegan
19 "stole" from it (conversion) and neglected to reimburse it
20 pursuant to a signed agreement (breach of contract). There is no
21 factual connection underlying the claim and counterclaim."
22 *Keegan v. Bloomingdale's Inc.*, 945 F. Supp. 165, 167 (N.D. Ill.
23 1996).

24 Likewise, there is no factual connection underlying
25 plaintiff's FLSA claim and defendants' negligence claim asserted
26 against the plaintiff. Moreover, defendants have made no showing
27 that such counterclaim has its own federal jurisdictional basis,
28 and indeed it does not. The counterclaim is based purely on tort

1 principles. Additionally, defendants cannot pursue the
2 counterclaim under a diversity jurisdiction theory, since
3 defendants have alleged far less than the requisite amount in
4 controversy in damages and defendants and the plaintiff are
5 citizens of the same state. Without its own independent federal
6 jurisdictional basis, the counterclaim cannot be resolved in this
7 case, and the Court must dismiss it.

8 **III. COUNTERCLAIMS ARE IMPROPER IN FLSA CASES**

9 Every Circuit Court that has directly addressed the
10 propriety of counterclaims by defendants in FLSA cases has ruled
11 employers are precluded from asserting counterclaims in such
12 cases. In precluding an employer from asserting counterclaims
13 against FLSA plaintiff employees, the Tenth Circuit stated:

14 "[T]he purpose of the present action is to bring [defendant]
15 into compliance with the [Fair Labor Standards] Act by
16 enforcing a public right. To permit him in such a proceeding
17 to try his private claims, real or imagined, against his
18 employees would delay and even subvert the whole process.
[Defendant] is free to sue his employees in state court, as we
are advised he is doing, for any sum which he feels is due and
owing him." *Donovan v. Pointon*, 717 F.2d 1320, 1323, (10th
Cir. 1983).

19 The Fifth Circuit, in declining to allow a counterclaim by
20 an employer against its employees seeking minimum wages under the
21 FLSA, opined:

22 "[T]he federal courts were not designated by the FLSA to be
23 either collection agents or arbitrators for an employee's
24 creditors. Their sole function and duty under the Act [the
25 FLSA] is to assure the employees of a covered company a
26 minimum level of wages. Arguments and disputations over
27 claims against those wages are foreign to the genesis,
28 history, interpretation, and philosophy of the Act." *Brennan
v. Heard*, 491 F.2d 1, 4, (5th Cir. 1974).

Every reported District Court decision has adhered to the
reasoning adopted by *Heard* and *Pointon* and held counterclaims are

1 barred in FLSA minimum wage and overtime cases. *See, Morrisroe*
2 *v. Goldsboro Milling Co.* 884 F.Supp. 192, 195 (E.D.N.C. 1994),
3 (Permitting an employer to collect on a debt owed by its
4 employees via a counterclaim in a FLSA lawsuit would undermine
5 the purpose of the FLSA) and *Conklin v. Joseph C. Hofgesang Sand*
6 *Co.*, 407 F.Supp. 1091, 1093 (W.D. Ky 1975), (The FLSA is to be
7 construed liberally in favor of the employee and courts have been
8 very strict in denying to employer set offs and recoupments).

9 **CONCLUSION**

10 For all the foregoing reasons, plaintiff's motion to dismiss
11 the counterclaim of the defendants should be granted in its
12 entirety together with such other and further relief as the Court
13 deems proper.

14
15 Dated: Clark County, Nevada
16 December 21, 2011

17 Submitted by the attorneys for the Plaintiffs
18 Leon Greenberg Professional Corporation

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